85-2105

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

DEBORAH DELAPLANE,
MICHAEL O'BRIEN, and
PAUL MOSHER,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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39PP

QUESTION PRESENTED

Whether the congressionally created "exclusionary rule" contained in Title III (18 U.S.C. § 2515) is applicable to the admissibility of foreign interceptions that fail to comport with the requirements of Title III, § 2510, et seq., notwithstanding that the judicially created "exclusionary rule" may not have been applicable to the admissibility of the intercepted communications.

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PETITION FOR WRIT OF CERTIORARI

Deborah Delaplane, Michael O'Brien, and Paul Mosher, Petitioners, respectfully pray that a Writ of Certiorari be issued to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled cause on December 2, 1985.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on December 2,

1985, in an opinion which has been designated for routine publication. The opinion is reproduced as Appendix "A" hereto. A Petition for Rehearing was denied in Case Nos. 84-1796 and 84-1798 on March 12, 1986, pertaining to Petitioners O'Brien and Mosher. On May 13, 1986, the Court consolidated all three cases for procedural purposes and stayed the mandates in Cases 84-1796 and 84-1798 (pertaining to Petitioners O'Brien and Mosher) until thirty days after the disposition of the Petition for Rehearing in Case No. 84-1312 (pertaining to Petitioner Delaplane) in order that all three individuals jointly be allowed to petition for a Writ of Certiorari in the United States Supreme Court. A copy of the Order is reproduced as Appendix "B" hereto. A Petition for Rehearing En Banc was denied on May 27, 1986.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 2, 1985, and a Petition for Rehearing En Banc was denied on May 27, 1986.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

———o———

QUESTION PRESENTED

Whether the congressionally created "exclusionary rule" contained in Title III (18 U.S.C. § 2515) is applicable to the admissibility of foreign interceptions that fail to comport with the requirements of Title III, § 2510, et seq., notwithstanding that the judicially created "exclusionary rule" may not have been applicable to the admissibility of the intercepted communications.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States—Fourth Amendment

Searches and Seizures regulated. The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, Section 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, Grand Jury, department, officer, agency, regulatory body, legislative committee, or other authority

of the United States, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

———o———

STATEMENT OF THE CASE

Petitioners were charged in one indictment returned by the Grand Jury in the United States District Court for the District of Colorado. The indictment charged all three petitioners with Conspiracy to Distribute and Possession with Intent to Distribute, Cocaine and Marijuana, Schedule I and II controlled substances respectively, all in violation of 21 U.S.C. § 841(a)(1), § 846, and 18 U.S.C. § 2.

The indictment further charged Petitioner O'Brien with being unlawfully present in the United States after having been arrested and deported, in violation of 8 U.S.C. § 1326.

Petitioner Delaplane tendered conditional pleas of guilty to Counts One and Two of the Indictment, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure on January 30, 1984.

Petitioner Mosher tendered a conditional guilty plea to one count of the Indictment on April 17, 1984. Petitioner O'Brien entered a Rule 11(a)(2) conditional guilty plea to one count of the Indictment on April 18, 1984. All three petitioners specified as an issue intended to be reserved for appellate review pursuant to the provisions of Rule 11, F.R.Crim.P., the issue of whether the evidence derived directly or indirectly from the wiretap conducted in Canada

is admissible or adjunctly, whether the Court erred in not granting the pre-trial Motion to Suppress such evidence.

This case had its genesis in an intercepted telephone conversation alleged to have been held between one Michael O'Brien and one Paul Mosher. Prior to the interception, an order was entered on March 22, 1983, by Justice Sulatycky of the Queen's Bench of Alberta, Canada, permitting interception of telephone conversations at Michael O'Brien's residence in Red Deer, Alberta. The basis of the order was information supplied to Corporal Neil Kingdon of the Royal Canadian Mounted Police by an unidentified informant. The informant stated O'Brien was to be involved in a major drug transaction that was to occur very soon, and that someone in the United States would be the source of the drugs.

On March 23, 1983, a conversation was intercepted which disclosed that O'Brien was to drive to Great Falls, Montana, where he was to meet with a woman named "Deb". O'Brien was to hand "Deb" money which she was then to take to San Francisco, California. O'Brien was to drive to Denver, Colorado, where he was to later meet "Deb" and Paul Mosher. O'Brien would then receive the drugs he agreed to buy.

The three individuals, Delaplane, O'Brien and Mosher met in Denver where they were arrested. At the time of their arrest, Delaplane was subjected to a search which resulted in the seizure of a quantity of cocaine concealed within her clothing.

The Government stipulated prior to trial that the intercepted communications in Canada did not comply with the requirements of 18 U.S.C. § 2510, et seq.

Petitioners Delaplane and Mosher are citizens of the United States. Petitioner O'Brien is a citizen of Canada.

On December 2, 1985, the United States Court of Appeals for the Tenth Circuit issued an opinion holding that the exclusionary rule did not apply to actions of the foreign police and that it was not necessary for the Canadian authorities to follow the mandates of 18 U.S.C. § 2510, et seq. The Court further found that the conduct of the Canadian officers did not "shock the judicial conscience", nor constitute a joint venture in light of the participation of American officers. The District Court's finding that the evidence derived from the Canadian wiretaps was admissible was upheld.

The Court did not address the issue of 18 U.S.C. § 2515 as a statutorily created exclusionary rule pertaining to contents of intercepted communications, but relied solely upon the Fourth Amendment's judicially created exclusionary rule.

———o———

REASONS FOR GRANTING THE WRIT

In determining the admissibility of foreign interceptions of wire communications, the United States Court of Appeals for the Tenth Circuit ostensibly bypassed the essential consideration of whether an intercepted communication acquired in a foreign country which is utilized against American citizens and non-citizens in a Federal Court in the United States must comport with the provisions of Title III, 18 U.S.C. § 2510, et seq.

Petitioners submit that the judicially created "exclusionary rule" which emanates from a concern that violations of the Bill of Rights, particularly the Fourth Amendment, should be deterred, is not an adequate predicate for deciding the issue of whether Congress, in enacting Title III, 18 U.S.C. § 2510, et seq., intended that it prevail as the standard of admissibility at any trial in the United States, either state or federal. This proposition subsumes Congress' concern with principles attendant to dual sovereignity. In essentially preempting the legislative field, Congress presumably determined that the admissibility of the contents of intercepted communications should be measured by a single standard which is contained in Title III.

The Court of Appeals did not undertake to delineate whether the congressionally created "exclusionary rule" contained in Title III, 18 U.S.C. § 2515, was applicable, notwithstanding that the judicially created "exclusionary rule" may not have been applicable to the admissibility of the intercepted communications in this case.

18 U.S.C. § 2515 clearly prohibits the use as evidence of intercepted wire communications or evidence derived therefrom if the disclosure of that information would be in violation of Title III, 18 U.S.C. § 2510, et seq. The Government stipulated in this case that the interceptions of the communications did not comport with the requirements of 18 U.S.C. § 2510. This stipulation warrants the conclusion that Petitioners' prosecution in the United States constituted an attempt by the United States Government, acting either alone or in concert with the Government of Canada, to strategically and purposefully deprive them of the statutory protection afforded by Title III. Title III

was adopted out of concern for the particular dangers to privacy posed by electronic surveillance. Thus, the disclosure of intercepted information causes separate and severe injury to privacy, and the suppression sanction of 18 U.S.C. § 2515 is designed to protect against this injury, not merely to serve the deterrent function of the traditional exclusionary rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 84-1312, 84-1796 and 84-1798
(D.C. Colo.)
(83-CR-109)

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

DEBORAH DELAPLANE, PAUL MOSHER and MICHAEL O'BRIEN,

Defendants/Appellants.

(Filed December 2, 1985)

Bruce F. Black (Robert N. Miller, United States Attorney, with him on the brief), Assistant United States Attorney, Denver, Colorado, Attorneys for Plaintiff-Appellee.

Joseph Saint-Veltri, Denver, Colorado, Attorney for Defendant-Appellant Delaplane.

Steven Janiszewski (Rod W. Snow with him on the briefs) of DIXON AND SNOW, P.C., Denver, Colorado, Attorneys for Defendants-Appellants Michael O'Brien and Paul Mosher.

Before BARRETT AND SEYMOUR, Circuit Judges, and GREENE,* District Judge.

BARRETT, Circuit Judge.

These consolidated appeals are before us in accordance with Fed. Rules Cr. Proc. rule 11(b), 18 U.S.C. Under

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* The Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

Rule 11(b), a defendant "may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion." Rule 11(b) also provides that if "the defendant prevails on appeal, he shall be allowed to withdraw his plea."

Michael O'Brien (O'Brien), Paul Mosher (Mosher) and Deborah Delaplane (Delaplane)[1] were indicted on March 30, 1983, and charged with conspiracy to distribute cocaine. Delaplane was also charged in a separate count with possession with intent to distribute cocaine. Prior to trial, appellants, collectively, filed some 43 motions which were joined by the district court for determination. Motion hearings extended over five days.

Evidence presented during the motion hearings tended to establish that from November, 1981, through March, 1983, Corporal Neal A. J. Kingdon, of the National Crime Intelligence Section of The Royal Canadian Mounted Police, Red Deer, Alberta, Canada, was engaged in an ongoing investigation into the suspected drug activities of O'Brien, a resident of Red Deer. During the course of the investigation, Cpl. Kingdon contacted Special Agent James R. Poland, U.S. Customs Service, Blaine, Washington, on January 21, 1983, and requested routine intelligence information about prosecutorial guidelines for Florida cocaine cases.

On January 24, 1984, Poland responded (via telephone) to Kingdon's injuiry and learned that O'Brien was the subject of the earlier inquiry. During their conversation Kingdon also asked Poland for the identity of the sub-

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[1] Hereinafter collectively referred to as appellants.

scribers of certain United States telephone numbers. Subsequent thereto, between February 1 and 9, 1983, Poland and Kingdon had several additional telephone conversations during which Poland responded to Kingdon's telephone subscriber inquiries and Poland related that a computer inquiry on O'Brien had disclosed a Canadian conviction which affected O'Brien's immigration status into the United States.

On March 22, 1983, Kingdon, acting on information received from an unidentified informant that O'Brien was to be involved in a "major drug transaction" that was to occur "very soon", applied for and received an order from the Queen's Bench of Alberta, Canada, for a wiretap of O'Brien's telephone at his Red Deer residence.

On March 23, 1983, a conversation was intercepted which indicated that O'Brien was going to drive to Great Falls, Montana, and meet a woman named "Deb"; O'Brien was to give Deb some money which she was to take to San Francisco; O'Brien was to drive to Denver, Colorado, where he would meet with Deb and Mosher; and that once in Denver, O'Brien would receive the drugs. After receiving the call, Kingdon contacted Poland who in turn contacted other agents in Great Falls and Denver to establish surveillance of Delaplane and O'Brien.

Delaplane, O'Brien, and Mosher were all arrested on March 25, 1983, at Denver's Stapleton Airport shortly after Delaplane's incoming flight had arrived. Delaplane was searched at the time of her arrest and officers seized one package of cocaine from her pocket and a second package of cocaine taped to her leg.

Following hearings on appellants' pre-trial motions, *supra,* the district court entered an order on September 6, 1983, finding, *inter alia:* that the Canadian wiretap and the

evidence derived therefrom need not be suppressed; that the evidence seized during a search of O'Brien's home shortly after his arrest was admissible; the search of Delaplane was a reasonable one incident to her arrest; and that the search of Mosher's trunk following his arrest was unlawful and the evidence seized in conjunction with the search inadmissible.

On January 30, 1984, Delaplane entered a conditional plea in accordance with Rule 11(b). On April 16, 1984, prior to the commencement of O'Brien's and Mosher's trial, the district court ruled that the Government could use both the original tape recordings of several wiretapped telephone conversations and also recorded voice exemplars of the defendants in presenting its case (R., Supp. Vol. III at 3-10).

On April 17, 1984, after a mistrial due to the absence of a juror, Mosher entered a Rule 11(b) conditional plea. O'Brien entered his Rule 11(b) conditional guilty plea the following day.

On appeal O'Brien and Mosher contend: (1) the evidence derived from the Canadian wiretap was inadmissible and should have been suppressed; (2) the court erred in ruling that it would allow the Government to establish their identification through the use of hearsay statements; and (3) the court erred in its ruling on the voice exemplars. Delaplane contends: (1) the evidence obtained from the Canadian wiretap was inadmissible; (2) the evidence seized from her at the time of her arrest was inadmissible; and (3) the court erred in imposing on her, in addition to a sentence of confinement, a special parole term of three years.

I.

The appellants contend that the evidence derived from the Canadian wiretaps was inadmissible and that the district court erred in denying their motions to suppress the contents of the wiretaps authorized by the Canadian court. Appellants contend that the wiretaps did not comply with the laws of Canada and the evidence derived therefrom would thus, have been inadmissible in Canada; further, that had the wiretaps occurred in the United States the evidence derived therefrom would have been equally inadmissible under U.S.C. § 2510 *et seq.* Appellants argue that federal agents of the United States substantially participated with Canadian officials so as to convert the investigation, including the wiretaps, into a joint venture, thus rendering the wiretaps subject to the exclusionary rule. Lastly, appellants argue that the totality of the circumstances surrounding the wiretaps, and the subsequent searches and seizures by the Canadian and United States agents are so shocking to fundamental notions of due process recognized in the United States as to warrant the exclusion of any evidence obtained therefrom.

The standard most consistently set forth in reviewing the applicability of the exclusionary rule to evidence seized by foreign police, and that which we now adopt, is set forth in *United States v. Hensel,* 699 F.2d 18 (1st Cir. 1983), *cert. denied,* 461 U.S. 958 (1983) wherein the court held:

> We first consider whether the "exclusionary rule" does not apply to this search because it was conducted by Canadians. As the government points out, the "exclusionary rule" does not require the suppression of evidence seized by foreign police agents, for the actions of an American court are unlikely to

> influence the conduct of foreign police. *See United States v. Rose,* 570 F.2d 1358, 1361-62 (9th Cir. 1978); *United States v. Morrow,* 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied sub nom. Martin v. United States,* 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). This principle does not dispose of the case, however, for there are two well-established exceptions to this rule: (1) where foreign police conduct "shock[s] the judicial conscience," *id.* at 139 and (2) where American agents "participated in the foreign search, or . . . [the foreign officers acted] as agents for their American counterparts. . . ."

699 F.2d at 25.

In determining that the evidence derived from the Canadian wiretaps was admissible in the case at bar, the district court found, *inter alia:*

> Interesting enough, examination of the issues raised here begins with the Government's concession that if the Canadian order and the subsequent events were to be judged by the standards of 28 U.S.C. § 2510, *et seq.*, they would fail the test. Yet, given the nature of the Canadian statutes regarding wiretap, this is not startling. Indeed, § 178.1 to 178.23 of the Canadian Criminal Code (relating to invasions of privacy) can easily be characterized as less stringent in terms of its requirements than its American counterpart. With that preamble, let us turn to the specific arguments.
>
> * * *
>
> The seminal question is whether the failure of the Canadian authorities to follow the mandates of 18 U.S.C. § 2510, *et seq.* or the defendants' inability to obtain the disclosure of information pursuant to 18 U.S.C. § 2518(a) requires an equitable remedy. After consideration, I believe that question should be answered in the negative.

From the evidence presented to me, it is my conclusion the institution of the interception was for the investigation of a Canadian offense, and it was not a product of cooperative effort between Canadian and American authorities.

* * *

This conclusion is supported by the testimony relating to the nature of the information sought by Kingdon and conveyed by Poland. From the time of the first conversation on January 21, 1983, to the conversation of March 23, 1983, Poland responded to specific informational requests from Kingdon. . . .* am convinced that while information was passed over the border, and while there was contact between Canadian authorities and agencies of the United States, two things are clear. First, the investigation leading to the Canadian wiretap was solely Canadian in nature. Second, American agencies did not become interested in any of the defendants as suspects in American offenses until March 23, 1983.

I must therefore conclude there was no joint endeavor between American and Canadian agencies in obtaining the Canadian interception order or the actual interception of conversations involving Defendant O'Brien. As this was a wholly foreign investigation, there is no reason why it should be judged by American standards. *U.S. v. Orman*, 417 F.Supp. 1126 (D. Colo. 1976); *U.S. v. Stonehill*, 405 F.2d 738 (9th Cir. 1969). Compare, *U.S. v. Phillips*, 479 F.Supp. 423 (M.D. Fla. 1979).

* * *

Defendants have argued their inability to effect rights otherwise cognizable in this proceeding coupled with the circumstances under which the Canadian wiretap culminated in this case should shock the senses of the Court to the extent dismissal or suppression should result in order to protect the concepts of justice and fair play. I disagree.

> I can find no evidence of misconduct or other activity which indicates investigative or prosecutorial overreaching. I must concluded (sic) the evidence leading to the initiation of the American investigation was procured within the limits of Canadian law and that the American investigation produced ample probable cause for the arrest of the defendants. Despite the fact the Canadian wiretap law is less protective of the accused than its American counterpart, I do not believe, when followed properly, the use of that law should result in the dismissal of charges against these defendants or the suppression of evidence against them.

R., Vol. I at 102-105. The record supports these findings of the district court. The conduct of the Canadian officers does not "shock the judicial conscience" nor did the participation of the American officers give rise to a joint venture. *United States v. Hensel, supra.* We hold that the district court did not err in finding that the evidence derived from the Canadian wiretaps was admissible.

II.

O'Brien and Mosher contend that the district court erred in ruling that it would permit the Government to identify them through the use of hearsay statements attributable to support personnel. This argument, which is made without citation to the record, challenges the district court's ruling that it would allow the introduction of a wiretapped telephone conversation between an unidentified male and an unidentified female in which the female exclaimed "Michael's back." The court ruled that the section of the tape would be admitted under Rule 803, Fed. R. Evid. 18 U.S.C. as evidence of the identity of one of the appellants, over the objection of O'Brien that the statement was inadmissible hearsay.

We hold the district court did not err in admitting the statement pursuant to Rule 803, under which statements are not excludable as hearsay even though the declarant is unavailable as a witness if the statement is "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

III.

O'Brien and Mosher contend that the district court erred in ruling that it would allow voice exemplars of them to be played to the jury and to provide the jury with transcripts of said exemplars. The voice exemplars were made in two ways, one with the defendants reading Time Magazine and one with the defendants reading the transcript from the original wiretap tapes. On the morning of O'Brien's and Mosher's trial date, the following colloquy occurred between the district court and trial counsel:

> THE COURT: All right, he's going to use the original tapes plus the exemplars, is that correct?
>
> MR. BLACK: That's correct, Your Honor. The exemplars were made, in two ways, one reading the Time Magazine article and one reading the transcript.
>
> I would propose to play both of those for each defendant, and play them in comparison to the composite tape.
>
> MR. SNOW: Of course—I think I'm speaking for both parties—we, of course, object to the fact they had to give oral testimony, which violated their Fifth and Sixth Amendment rights. Second, and more importantly, our position is to read the actual transcript itself is, additionally, inflammatory to the jury, high-

ly prejudicial, and, at best, the Court should relegate this to the reading of the extraneous material, pursuant to the two cases cited by Mr. Black, and I believe it is Williams that stated innocuous material, like in that case, Time Magazine, that it should not be highly prejudicial. The only case left is the *Brown* case that he could rely on in this court, and we submit to the Court that's not the law in the Tenth Circuit.

THE COURT: Do you have any law to the contrary?

MR. SNOW: No.

THE COURT: All right, I'm going to allow the government to proceed with the exemplars. I don't think his exemplars are a waiver of the Fifth and Sixth Amendments. I will, however, when the transcript are produced, I will give the jury a cautionary instruction that the evidence in the case is the original tape or tapes, and their contents, and that the transcripts are submitted simply as a guideline to assist them in understanding the evidence, and if there is any discrepancy with what they hear in the tapes and what they see on the tapes, they are to be guided by the tapes.

MR. SNOW: With that, again, we object to the transcripts, because the tapes are there, but assuming they are going to the Court and to the jury and only for their reading during the playing, and not as an exhibit—

THE COURT: That's correct.

R., Supp. Vol. III at 4-5.

The compelled production of voice exemplars to be used to measure the physical properties of the witnesses' voices, and not for the testimonial or communicative content of what was to be said, does not give rise to a violation of the Fifth Amendment's privilege against self in-

crimination, *United States v. Dionisio,* 410 U.S. 1, 7 (1973). Nor, for that matter, does requiring a defendant to demonstrate his voice by speaking the exact words spoken at the crime. *United States v. Wade,* 388 U.S. 218 (1967). The privilege attaches only to testimonial compulsion and does not attach to demonstrative, physical or real evidence. *United States v. Williams,* 704 F.2d 315, 317 (6th Cir. 1983), *cert. denied,* — U.S. —. *See also United States v. Lamb,* 575 F.2d 1310, 1316 (10th Cir. 1978), *cert. denied,* 439 U.S. 854 (1978).

The voice exemplars opposed by O'Brien and Mosher were not being offered for the testimonial or communicative evidence of what was said, but rather, and only for comparative purposes. The law in this area was well summarized in *United States v. James,* 496 F.Supp. 284 (W.D. Okl. 1977). The court there stated:

> A tape recording of a conversation between an accused and another may be admissible in evidence against the accused. *Osborn v. United States,* 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); *United States v. Quintanta,* 457 F.2d 874 (10th Cir. 1972), *cert. den.,* 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d 130. Tapes of an accused's conversation with law enforcement officers, voluntarily made, may also be admissible. *Allen v. United States,* 333 F.2d 679 (1st Cir. 1964), *cert. den.,* 379 U.S. 841, 85 S.Ct. 79, 13 L.Ed.2d 47. Even if the recording was made without the accused's knowledge, it may be admissible. *United States v. Klosterman,* 147 F.Supp. 843 (E.D. Penn. 1957). Courts have recognized that requiring a Defendant to give a demonstration of his voice for identification purposes by speaking the exact words spoken at the commission of a crime is not violative of his privilage against self

incrimination. *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *State v. Freeman,* 195 Kan. 561, 408 P.2d 612 (1965) *cert. den.* 384 U.S. 1025, 86 S.Ct. 1981, 16 L.Ed.2d 1030; *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1972); *United States v. Raymond,* 337 F.Supp. 641 (D.C. Cir. 1972); *United States v. Askins,* 351 F.Supp. 408 (D. Md. 1972). Nor do required voice exemplars violate the prohibition against unreasonable search and seizure. *In re Dini,* 322 F.Supp. 393 (N.D. Ill. 1971). Claims that a person's right to equal protection of the laws has been violated by requiring a person to speak in a line up for voice identification have been rejected. *Gilbert v. United States,* 366 F.2d 923 (9th Cir. 1966), *cert. den.* 388 U.S. 922, 87 S.Ct. 2123, 18 L.Ed.2d 1370; *Stiltner v. Rhay,* 371 F.2d 420 (9th Cir. 1967), *cert. den.* 387 U.S. 922, 87 S.Ct. 2038, 18 L.Ed.2d 977.

496 F.Supp. at 288.

We hold that the district court did not err in ordering the compelled production of voice exemplars from O'Brien and Mosher and in approving the Government's proposed voice identification procedure. The district court properly related to counsel that it would give the jury a cautionary instruction that the evidence in the case was the original tapes, and that the jurors were to be guided by them.

IV.

Delaplane contends that any evidence seized directly or indirectly as a result of the search of her person at the time of her arrest at Denver's Stapleton Airport should be suppressed. Delaplane argues that the Government failed to establish probable cause to arrest her, that neither arrest warrants nor search warrants were obtained by the arresting officers; and that under the "fruit of the poison-

ous tree doctrine," the evidence seized during the search of her person should have been suppressed.

In determining that the search of Delaplane was reasonable incident to her arrest, the district court found:

> Defendant Delaplane was searched by DEA Agent Gloria Woods. Agent Woods was called to Stapleton Airport by her supervisor who indicated a female suspect was going to be taken into custody.
>
> • • •
>
> Before arriving, Woods was also aware that the "female" she was to contact was probably carrying narcotics. Defendant argues not only was there no probable cause for her arrest, but also because of Agent Woods awareness, the warrantless search of her person was unreasonable as the arresting agents could neither justify it upon the possibility she was armed nor upon any other exigency.
>
> First, from my initial recitals, I believe the evidence disclosed the officers had sufficient probable cause to arrest all three defendants.
>
> • • •
>
> Second, as to Defendant Delaplane, the fact that she had probably gone through a metal detector in San Francisco does not make unreasonable a "pat down" search at a subsequent time. I believe the search of her person was a reasonable incident to her arrest. *Michigan v. DeFillipo,* 443 U.S. 31 (1979), *U.S. v. Hansen,* 652 F.2d 1374 (10th Cir. 1981).

R., Vol. I at 00106.

In *Michigan v. DeFillipo,* cited by the district court, the Court held:

> The constitutionality of a search incident to an arrest does not depend on whether there is any indication

> that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.

443 U.S. at 35. *See also Lavicky v. Burnett,* 758 F.2d 468, 474 (10th Cir. 1985). We there observed that a valid search incident to arrest requires that the arrest and search be substantially contemporaneous.

Applying these standards, we hold that the district court did not err in denying Delaplane's motion to suppress the evidence derived from the search of her person.

V.

We have carefully considered the appellants' remaining allegations of error. We hold that they are individually and collectively, without merit.

AFFIRMED.

APPENDIX "B"

MAY TERM—May 13, 1986

Before Honorable James E. Barrett, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable J. Thomas Greene*

Nos. 84-1312
84-1796
84-1798

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEBORAH DELAPLANE, a/k/a Deborah Winters, Cook Winters, Deborah Mosher, PAUL MOSHER and MICHAEL FRANCIS O'BRIEN,

Defendants-Appellants.

The Court presently has under consideration appellant's petition for rehearing and suggestion for rehearing en banc in case No. 84-1312.

By previous orders the Court recalled and stayed the mandates in cases 84-1796 and 84-1798 pending timely filing of petitions for writs of certiorari in the Supreme Court of the United States. The Court now has for consideration appellants' motion to modify the stay of mandates in these two cases and to consolidate all three cases.

Upon consideration whereof, the Court orders the captioned cases consolidated for all procedural purposes.

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* District Judge of the United States District Court for the District of Utah, sitting by designation.

The mandates in cases 84-1796 and 84-1798 are stayed pending disposition of the petition for rehearing in case 84-1312, and will be further stayed for thirty (30) days after disposition of that petition for rehearing. Further, if on or before that date there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court of the United States that appellants in cases 84-1796 and 84-1798 have timely filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition in the Supreme Court.

/s/ Robert L. Hoecker
Clerk

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2105

In the Supreme Court of the United States

OCTOBER TERM, 1986

DEBORAH DELAPLANE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that foreign wiretap evidence should be suppressed if the foreign officers who obtained the evidence did not comply with the requirements of the federal wiretap statute.

In an indictment returned in the United States District Court for the District of Colorado, the three petitioners were charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner Delaplane was also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). All three petitioners entered conditional pleas of guilty, reserving the right to appeal the validity of electronic surveillance that had been conducted by Canadian authorities in Canada. Petitioner Delaplane was sentenced to concurrent terms of five years' imprisonment, and petitioners O'Brien and Mosher were sentenced to four years' imprisonment. Delaplane was also

sentenced to a special parole term of five years on the possession count. The court of appeals affirmed (Pet. App. 1-14; 778 F.2d 570 (1985)).

1. The evidence presented during the motion hearings is summarized in the opinion of the court below. It showed that from November 1981 through March 1983, Corporal Neal A.J. Kingdon, of the Royal Canadian Mounted Police, was investigating the suspected drug activities of petitioner O'Brien, a resident of Red Deer, Alberta. At several points during the investigation, Kingdon requested routine intelligence information from a United States Customs Service agent in the State of Washington. Pet. App. 2-3.

During his investigation, Kingdon learned from an unidentified informant that O'Brien was soon to be involved in a major drug transaction. Kingdon obtained a court order from the Queen's Bench court of Alberta to wiretap O'Brien's telephone at his residence in Red Deer. Pet. App. 3. The next day Kingdon learned from an intercepted conversation that O'Brien was going to meet a woman named "Deb" in Great Falls, Montana. The conversation revealed that O'Brien was to give "Deb" money to take to San Francisco, after which the two would meet with petitioner Mosher in Denver, where O'Brien would receive drugs. After the interception, Kingdon called the Customs agent from whom he had previously obtained intelligence information. That agent in turn contacted other agents in Great Falls and Denver to establish surveillance of the suspects. *Ibid.*

On March 25, shortly after petitioner Delaplane's incoming flight arrived, petitioners were arrested at the Denver airport. Delaplane was searched incident to her arrest, and the officers seized two packages of cocaine from her. Pet. App. 3.

Following their indictment, petitioners challenged the evidence that was obtained as a result of the Canadian wiretap. The district court denied the suppression motion, finding that neither the federal wiretap statute, 18 U.S.C. 2510 *et seq.*, nor the Fourth Amendment exclusionary rule required that the fruits of the Canadian wiretap be excluded. Pet. App. 6-8. The district court found that the wiretap was conducted as part of an investigation of a Canadian offense, and was not the product of a joint investigation by Canadian and American authorities. Pet. App. 7. The district court further concluded that the circumstances under which the court-authorized Canadian wiretap was conducted did not "shock the senses of the Court" and therefore did not require suppression on due process grounds. *Id.* at 7-8. Although noting that Canadian wiretap law is less restrictive than its American counterpart, the district court concluded that the Canadian authorities had followed Canadian law to obtain the wiretap evidence. The court therefore held that there was no reason to suppress that evidence when it was offered in an American court. Pet. App. 8. The court of appeals upheld the district court's findings and agreed with its conclusion that the Canadian wiretap evidence and its fruits need not be suppressed simply because the evidence was not obtained in a manner that would have satisfied the American wiretap statute. Pet. App. 8.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

Petitioners' sole contention (Pet. 6-8) is that the federal electronic surveillance statute, 18 U.S.C. 2510 *et seq.*, governs the admissibility of all wiretap evidence in trials in the United States and therefore required the suppression of the Canadian evidence. That contention lacks merit.

The federal wiretap statute regulates only domestic interceptions. Evidence seized by foreign officials in the course of foreign wiretaps is therefore admissible in United States courts, even if that evidence was obtained without satisfying the standards set forth in the federal statute. See *Stowe* v. *Devoy*, 588 F.2d 336, 340-342 (2d Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974); *United States* v. *Bennett*, 538 F. Supp. 1045, 1048 (D. P.R. 1982); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 157 n.6 (D.D.C. 1976).

Petitioners take the extreme position that any wiretap evidence obtained anywhere in the world must be suppressed if it does not conform with all the requirements of the federal statute. If accepted, that argument would have the effect of excluding all foreign wiretap evidence, because the federal statute limits the power to apply for an interception order to the Attorney General, his principal assistants, and the principal prosecuting attorneys of the 50 states, Puerto Rico, the District of Columbia, and the United States territories and possessions. 18 U.S.C. 2510(3), 2516. The far more reasonable interpretation of the statute is that it does not apply to conduct outside the United States. That interpretation is consistent with the established canon of statutory construction that federal statutes apply only within the United States unless a contrary intent appears. *Foley Bros.* v. *Filardo*, 336 U.S. 281, 286 (1949); *United States* v. *Cotroni*, 527 F.2d at 711. In the case of the federal wiretap statute, the legislative history firmly supports the view that the statute applies only to interceptions within the United States: the Senate report on the wiretap statute explained that the term "wire communication," which defines the reach of the statute with regard to wiretaps, means communications carried by a common carrier

"through *our Nation's* communications network." S. Rep. 1097, 90th Cong., 2d Sess. 89 (1968) (emphasis added).

Moreover, there is no basis for employing the sanction of exclusion to evidence seized by foreign officials in a foreign country. The scope of the statutory suppression remedy is governed by its exclusionary rule provision (18 U.S.C. 2518(10)). See *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). The legislative history of the statute shows that there was no intention to expand the scope of the statutory exclusionary rule beyond existing law (*id.* at 528). Under existing law, the constitutional exclusionary rule does not require the suppression of evidence seized by foreign police. *United States* v. *Janis*, 428 U.S. 433, 455-456 n.31 (1976); *United States* v. *Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985); *United States* v. *Hensel*, 699 F.2d 18 (1st Cir.), cert. denied, 461 U.S. 958 (1983); *Stowe* v. *Devoy*, 588 F.2d at 341; *United States* v. *Morrow*, 537 F.2d 120, 139 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977); *Stonehill* v. *United States*, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969). Accordingly, there is no statutory basis for excluding evidence of the sort at issue in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

DOJ-1986-07